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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Compatibility Between Cable	)	
Systems And Consumer	)	PP Docket No. 00-67
Electronics Equipment	)	

To: The Commission

Reply Comments of Circuit City Stores, Inc.

Circuit City Stores, Inc. ("Circuit City") respectfully submits these reply comments in connection with the April 24, 2000 Notice of Proposed Rule Making ("NPRM") issued by the Federal Communications Commission in the above-captioned proceeding.[1]

In its comments filed on May 24, Circuit City expressed its concern that a Cable industry attempt to portray the IEEE 1394 interface as synonymous with "interactivity" could portend second-class status for the already-delayed "bidirectional" OpenCable interface. Circuit City also worried that the industry's proposal of restrictive and anti-consumer licensing terms for competitive (but not MSO) Navigation Devices would doubly deprive consumers, imposing a regime that defeated their legitimate viewing and home recording expectations, and depressing competition by putting competitive products at a further disadvantage compared to those distributed by MSOs. The comments of motion picture and Cable industry interests have given hard substance to these concerns. These comments also provide evidence in support of Circuit City's view as to the only real solution: that competition will reign, as Congress demanded, only when MSO devices must rely on the same OpenCable specifications as are made available to competitors. In light of the industry's performance to date, the FCC should exercise its reserved right to move up the date upon which its order – affirmed two days ago by the Court of Appeals[2] – will finally assure such competition.

I. The Commission Should Reject The NCTA/CEA Labeling Proposal.

Circuit City today joins other major consumer electronics retailers – Best Buy, RadioShack, Sears, the International Mass Retail Association, and the National Retail

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[1] *In the Matter of Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Notice of Proposed Rulemaking (Rel. Apr. 14, 2000).

[2] *General Instrument Corp. v. FCC*, No. 98-1420 (D.C. Cir. June 6, 2000).

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Federation – in flatly opposing the labeling recommendation submitted to the Commission by NCTA and CEA.[3] Although Circuit City has worked cooperatively with both CEA and NCTA and intends to do so in the future, it cannot endorse or even countenance labels that would mislead and misinform consumers, would implicitly enlist the Commission in an agenda to thwart reliance on interactive OpenCable specifications, assumes the abolition of the (non-1394) interfaces upon which consumers rely today, and ignores the concurrent emergence of additional digital interfaces. The Circuit City May 24 filing discussed in detail why all of this would flow from such an approach to labeling.[4]

The CERC reply filing in which Circuit City joins lays out a comprehensive critique of the approach taken in the NCTA/CEA recommendation. Its major points are:

- **Any Fair Reading Of The Proposed Labels Suggests There Will Never Be An Interactive OpenCable Specification.**

It seems amazing that Time Warner Cable, one of the largest MSOs, and the NCTA, which speaks for CableLabs, could make entire filings on the subjects of OpenCable and interactivity, and never *once* refer to the fact that there is supposed to be a bidirectional, interactive OpenCable specification. This specification, under tardy but steady development for several years, is designed to allow a POD-enabled integrated DTV receiver to provide interactive cable services **without the need for any additional box, hence without the need of a 1394 interface**.[5] Yet the only fair conclusion to be drawn from the Time Warner and NCTA filings is that they envision a future in which the Consumer Electronics ("CE") and Information Technology ("IT") industries are relegated to providing only "dumb monitors," with electronics still to be provided, on a noncompetitive basis, by Cable MSOs.

Time Warner:

> Without a 1394/5C connector, digital television devices cannot provide consumers with the full functionality of interactive digital services offered now or in the future by cable operators and other MVPDs.[6] *** [A]s explained above,

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[3] Letter from Robert Sachs and Gary Shapiro to William E. Kennard, PP Docket No. 00-67 (filed May 24, 2000).

[4] Circuit City Comments at Section II.

[5] The fact that this specification exists is supported by a recent statement by Don Dulchinos, Senior Director of Advanced Platforms and Services at CableLabs. David Iler, *SCTE Seeks Middleware Standard for Set-Tops*, Broadband Week, June 5, 2000, at 34B. However, Mr. Dulchinos goes on to say that the first OpenCable-compliant set top boxes will not become available until the "holiday 2001 time frame," almost one and a half years after the Commission's deadline. *Id.* at 35B. This late date does conform to the date Circuit City and others favor for full compliance by MSO-provided devices with OpenCable specifications.

[6] Time Warner Cable Comments at iii.

devices that do not include 1394/5C will be unable to deliver the full range of services available from cable operators and other MVPDs.[7]

NCTA:

While these DTV sets can be directly connected to a cable system ... they may not function with certain two-way, interactive services unless they have a "1394/5C" connector which can be attached to an advanced digital cable set-top box.[8]

If the Cable industry intends never to finish, support, or rely upon the bidirectional, interactive OpenCable specification for integrated DTV receivers, it should so inform the Commission, and participants in the OpenCable process, now. That the industry is already drawing distinctions between its proprietary, "advanced" devices and those of competitive entrants confirms the wisdom of the FCC order that was affirmed two days ago: that the technological medicine served to competitors must be considered fit for the entrenched providers as well.

- **The Proposed Labels Are Misleading In Assuming That Only The 1394 Interface Will Offer Box-to-Box Interactive Services.**

Circuit City and several other commenters have made the point that both present MSO devices and present HDTV receivers rely on interfaces other than 1394, yet provide interactivity to customers. One assumes that interactivity will also be supported by future interfaces, such as HDCP, which has been developed by Intel and others.[9] The proposed labels either ignore these facts, or betray an agenda to stamp out these other interfaces in favor of the 1394 interface. Circuit City has stressed its marketplace enthusiasm for the 1394 interface in home networks for functions **as to which box-to-box connections are necessary**. But the Commission should not by regulation – and certainly not in the guise of informative "labeling" – lend its support to an agenda that would remove interface specifications from the marketplace.

- **The Proposed Labels Are Misleading In Assuming That Only The 1394 Interface Will Be Available To Carry HDTV Programs From Box To Box.**

The labels' equation of the 1394 interface with the ability of an integrated DTV receiver to receive HDTV programming defies rational explanation. One must conclude that Cable

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[7] *Id.* at 17.

[8] NCTA Comments at 7 (emphasis in original).

[9] Fox Comments at 13-14.

interests have fostered this approach to compel conclusions that (1) additional boxes will always be necessary for DTV receivers to tune cable HDTV programs, and (2) such boxes must be connected by a 1394 (and not, *e.g.*, an RGB or HDCP) interface. By accepting these labels, the FCC would be accepting these propositions, which are at clear variance with both OpenCable and competitive choice. While such a regulatory conclusion is not warranted in any case, it certainly should not slip in the "back door" through labeling.

- **In Addition To Being Misleading, The Proposed Labels Are Unclear And Based On Supposition.**

"DTV set" is not defined. No agreement with content providers has yet been reached as to 1394/5C licensing, nor has the 1394 interface yet been deployed in any DTV receiver or set-top box. The DFAST license remains a draft that has yet to be accepted by licensees or approved by the FCC. Until the license and specification terms are known, it remains unclear how or whether "interactivity" actually would work in the licensed devices.

Circuit City's view is that the proposed labels represent a failed negotiation that drifted into irrelevant and dangerous agendas. A Band-aid won't do for this proposal. It requires a tourniquet.

II. Motion Picture And Cable Industry Comments Confirm Circuit City's Concerns That The DFAST License Would Endanger Both Consumer Rights And Competition.

Circuit City's May 24 comments claimed that the text and objectives of the draft DFAST license would give motion picture and Cable interests the power to abrogate consumer viewing and home recording rights, and would make competitive Navigation Devices permanently inferior to those offered by MSOs. Sadly, the comments received by the Commission confirm that, if granted, this power would be abused. For example, the Time Warner comments contain this agenda statement:

> It is ... understandable that content providers are unwilling to license digital content absent concrete assurances that any copy protection conditions in such licenses are strictly enforced. Accordingly, copy protection must be incorporated into digital televisions, DVD players and other digital terminal devices so as to allow decrypted digital signals to flow directly to the final display circuit of consumer video equipment, *but not to any circuit where such decrypted signals can be stored, forwarded, copied, or exported.*[10]

[10] Time Warner Cable Comments at 7 (emphasis added).

MPAA and Fox propose that *all* programs flowing over cable systems in digital format – even those that are freely broadcast contemporaneously – should be encrypted.[11] So what Time Warner is suggesting here is that no POD-enabled IT or CE device should be capable of storing, forwarding, copying, or moving any digital cable program, including those originating as free broadcasts, unless subject to an arbitrary regime of encryption and device authentication. The consequences of such a one-sided regime would be devastating for consumers:

- RGB and other component analog interfaces, relied upon by DTV receivers and computer monitors now in consumer hands, could no longer receive signals;
- Home recording devices would be subject to encryption obligations and conditions not specified or even outlined in the DFAST license;
- Even ephemeral storage carriage and storage of signals in display devices would be subject to unspecified encryption obligations.

Moreover, while several of the motion picture industry comments refer to different levels of copy control, not one of them refers or commits to a regime of **encoding rules** to govern how and when such copy control technologies would be applied. The filings do not give any reason for the Commission or anyone else to feel comfortable that consumers using competitive devices, subject to the DFAST license, would be treated in any way that acknowledges or preserves their reasonable and customary home recording and viewing practices to date.

III. The Cable Industry Cannot Disclaim Its Responsibilities, Or Continuing Commission Jurisdiction, By Disowning or Disavowing CableLabs.

One of the most troubling comments received by the Commission on May 24 is the NCTA assertion that despite the NCTA's past promises and assurances to the FCC that CableLabs and OpenCable will shoulder the industry's Navigation Device obligations, CableLabs is immune from, and can ignore, Commission rules and regulations! Giving credence to this assertion would make a mockery not only of the "right to attach," but of the Commission itself.

NCTA says that Commission rules *"limit the conduct of 'multichannel video programming distributors' and under the Rule's own definition, CableLabs is not an MVPD."*[12] This assertion ignores several plain facts:

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[11] MPAA Comments at 7-8. *See also* Fox Comments at 15-18.

[12] NCTA Comments at 21.

- CableLabs is owned entirely by MSOs, who are MVPDs.

- NCTA, an organization of MVPDs, has phrased its promises to the Commission in terms of CableLabs activities, and has reported to the Commission on CableLabs' behalf.

- If CableLabs is neither an MVPD nor has any delegated authority from MVPDs, it has no right under Commission rules to handle PODs or other security devices, and no right to impose constraints on the "right to attach" under Commission rules, so has no power to offer a DFAST or any other license to competitive entrants.

- If CableLabs' licensing activities have no standing under Commission rules, the NCTA and its members, in their promises and reports to the Commission with respect to CableLabs' activities, have defrauded the Commission and the public and should be subject to immediate sanction in CS Docket 97-80.

If, suddenly, CableLabs and the activity it has undertaken on behalf of MSOs have no standing before the Commission, then the DFAST license is illegal on several additional grounds – lack of rationale as to MSO security concerns, lack of legal standing as to the right to attach, and anticompetitive cartel behavior with no legal or regulatory rationale. But if CableLabs is not responsible under FCC regulations for the DFAST license, then the MSOs who own it are.

What is most troubling to Circuit City is that at this late stage the NCTA can so crassly seek to undermine, with sharp and circular legal arguments, what was supposed to be a good faith undertaking to the Commission. Clearly the Commission, in reliance on NCTA and MSO letters of assurance,[13] has not shared NCTA's newfound interpretation of CableLabs' status. In Part F of its Reconsideration Order (entitled "CableLabs Standards process") the Commission reiterated its explicit reliance on NCTA and MSO representations:

> 38. The rules adopted in the *Navigation Devices Order* provide for a separation of security and non-security functions in navigation devices. To connect these two devices, the rules provide that the "conditional access function equipment" provided by MVPDs "be designed to connect to and function with other navigation devices available through the use of a commonly used interface or an interface that conforms to appropriate technical standards promulgated by a national standards organization." With respect to the cable television, **we relied on representations from the cable television industry that the Cablelabs's OpenCable initiative**, an undertaking of major segments of the industry, would lead to the standardization, design, and production of digital security modules, permitting the

[13] *Navigation Device R&O* ¶ 77-78 (citing June 3, 1998 letter from Neal Goldberg to William Johnson and June 3, 1998 Letter from Leo Hindrey, *et al.* to Decker Anstrom).

design, production and distribution of navigation devices for retail sale and would provide a 'commonly used interface' as provided for in Section 76.1204(b).[14]

IV. Circuit City Does Not Oppose Fair And Balanced, And Fairly Applied, Copy Protection. The Commission's Jurisdiction Over The DFAST License, And Its Obligations To Protect Competitive Entry, Are Clear.

Several commenters have attacked a straw-man caricature of the Circuit City position as to the illegality of the DFAST license. Time Warner Cable, for example, claims that Circuit City, "has sought to undermine" copy protection.[15] Circuit City has done nothing of the sort. Circuit City has not opposed a reasonable and balanced copy protection regime for signals passing over cable.

A. Circuit City Has Insisted That Any Copy Protection Rules Be Balanced And Fair To Consumers.

What Circuit City has done, in its February 2 *ex parte* and its May 24 comments, is make the following points:

- **The DFAST license "compliance rules" do not implement copy protection in a reasonable or balanced fashion.**

They would cut off or degrade interfaces without giving recent purchasers of HDTV receivers any opportunity to obtain Navigation Devices to provide high resolution pictures to them; they would prevent all home recording at the whim of the content provider or MSO.

- **The DFAST license would govern competitive but not MSO devices.**

Circuit City pointed out in its May 24 comments that until 2005, MSO devices need not encounter DFAST technology. Moreover, in negotiations with OpenCable participants, CableLabs has taken the position – at variance with the NCTA position criticized above – that it can *never* bind MSOs, as it is owned by MSOs.

- **The DFAST license provisions, to address "forwarding" of programs to home interfaces and copy protection public policy issues, would require Commission approval.**

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[14] *Navigation Device Reconsideration Order* ¶ 38 (footnotes omitted). The cable industry admits this itself in its semiannual Status Report filings in Docket 97-80. *See, e.g.*, AT&T Broadband, *et al.*, Status Report, CS Docket No. 97-80 (filed Jan 7, 2000) ("The Commission ordered the filing of semiannual reports to assure itself that the cable industry, through ... CableLabs ... was making steady progress in the development of specifications ... to foster the availability of navigation devices....")(emphasis added).

[15] Time Warner Cable Comments at 9-10. *See also* Viacom Comments at 3, 6.

The Commission has plainly reserved jurisdiction over all aspects of OpenCable implementation, including the DFAST license. Initial implementation has been through regulations protecting the "right to attach."[16]

- **The Commission should not approve a DFAST license that ventures into copy protection unless and until these inequities are addressed and resolved.**

To do otherwise would be to become complicit in drowning the OpenCable process on which the Commission has relied.

B. Any Copy Protection Provisions In The DFAST License Are Clearly Subject To Commission Jurisdiction And Must Be Subject To Commission Approval.

The Commission regulations cited by Circuit City are illustrative of the Commission's proper concern that a licensing process, meant to vindicate a "right to attach," not be subverted by contractual impositions that would elevate the business interests of the monopolist, whose regime is to be deregulated, over the competitive entrant licensees. Several motion picture industry and cable commenters claim that the Commission made an exception for "copy protection," as well as conditional access and security concerns, in paragraph 63 of the R&O. But they cite only the end of that paragraph, not the full text. The entire paragraph, instead, draws a *delineation* between the types of conditional access that are reserved to the POD device, and may be protected through restrictions on the host, and the forms of copy protection, which rely on milder encryption and authentication techniques, which do not implicate system security so may be allowed in the host. The entire text of this paragraph reads:

> 63. As discussed above, many types of navigation devices are now being, or will in the future be, attached to multichannel video programming distribution systems. A number of different entities in the communications stream and a number of types of security, access control, or data encryption systems are involved. The security separation required by the rules adopted herein is applicable **to access controls directly applied by the MVPD to authenticate subscribers' identification**. It would not, for example, be applicable to encrypted telephone or internet data used to protect the privacy of the communications or to digital authentication of financial transactions regardless of the use of such devices with multichannel video programming distribution systems. Access controls included in hardware for the purpose of allowing subscribers to exclude communications would not be included even though they perform a type of conditional access function. **"Copy protection" systems** and devices that impose a limited measure of data encryption control over the types of devices that may record (or receive) video content would not be subject to the separation requirement. "Software" based encryption should generally be

[16] See discussion below.

> separable from the hardware that runs it and thus would not have to be changed based on the rules adopted. Equipment needed for specifically addressed communication, such as for example modems for the receipt of "internet protocol" telephony could retain integrated in the hardware sufficient address information to permit them to function.

Any reading of the entire paragraph makes clear that its purpose is to *draw a distinction* between "conditional access" that pertains to user authentication to, and protection of, the system, and "copy control" and other measures, such as privacy and V-Chip implementation, that do not serve such a purpose. In the broader context of the Congress's goal of promoting competition, the Commission has clearly given advance approval to imposition by CableLabs *only* of contractual limitations necessary to protect system security and subscriber authentication, and not to the other sorts listed above. Moreover, the Commission explicitly and repeatedly has reserved jurisdiction over CableLabs' implementation of industry promises. It is crystal clear that the Commission must approve any ventures of the DFAST license into copy protection.[17]

C. OpenCable Specifications And Copy Control Impositions Should Apply To MSO-provided, As Well As Competitive, Devices.

In attempting to have things all ways, NCTA has claimed that the Commission cannot limit or oversee the activities of CableLabs, and CableLabs has claimed that it can never bind the activities of MSOs. If the Commission were to accept this *Catch 22*, it would need to report back to the Congress that, although it has enacted regulations to assure competitive availability, these regulations cannot achieve competition or limit impositions on competitors.

While the NCTA argument is easily dismissed as a contrivance, the CableLabs point is well taken – only by regulating the MSOs themselves can the Commission implement Congress's mandate to *assure* competition in the market for Navigation Devices as to "multichannel video programming and other services offered over multichannel video programming systems." As Circuit City has long argued in this proceeding, the FCC has two regulatory paths for so doing: step-by-step regulatory intrusion; or marketplace incentive. The latter course – recently affirmed by the Court of Appeals – better fulfills the means and purposes of the 1996 Telecommunications Act and the philosophy of the present Commission. The steps involved in pursuing it ought to be plain:

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[17] Some commenters make an additional stab at claiming *carte blanche* to impose copy protection strictures based on Section 304's acknowledgment that regulations should not "jeopardize" system security. This rationale – as well as the entire rationale for equating interests such as "copy control" with "system security" – is demolished by the recent Court of Appeals opinion cited above.

1. MSOs should rely on the same technology that they have devised for their competitors' entry.

2. Given the pace of the digital transition, and the recalcitrance tracked in Circuit City's May 24 filing, the date on which such reliance occurs must be moved up at least to January 1, 2002 to be meaningful.[18]

Conclusion

Circuit City commends the Commission for its attention to the role of competition in the transition to DTV. It recognizes this proceeding as pivotal and pledges its full cooperation in bringing it to a resolution that is fair to consumers, as well as all interested parties.

Respectfully submitted,

CIRCUIT CITY STORES, INC.

Alan McCollough
President and COO

W. Stephen Cannon
Sr. Vice President and General Counsel
Circuit City Stores, Inc.
9950 Mayland Drive
Richmond, VA 23233
(804)527-4014

Of Counsel

Robert S. Schwartz
Catherine M. Krupka
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005
(202)756-8081

June 8, 2000

[18] See *supra* note 5.

Certificate of Service

I, Janet Davis, hereby certify that true copies of the foregoing Reply Comments Circuit City Stores, Inc., were served by hand on June 8, 2000, to the persons listed below.

Ms. Magalie Salas
Secretary
Federal Communications Commission
445 12th St., SW - Room TW-B204
Washington, DC 20554

Chairman William E. Kennard
Federal Communications Commission
445 12th St., SW - Room 8B-201
Washington, DC 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 12th St., SW - Room 8A-302
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
445 12th St., SW - Room 8B-115
Washington, DC 20554

Commissioner Michael Powell
Federal Communications Commission
445 12th St., SW - Room 8B-204
Washington, DC 20554

Thomas Horan
Federal Communications Commission
445 12th St., SW - Room 7C-754
Washington, DC 20554

Henry L. Baummann
Jack N. Goodman
Valerie Schulte
Ann Zuvekas
National Association of Broadcasters
1771 N Street, NW
Washington, DC 20036

Commissioner Gloria Tristani
Federal Communications Commission
445 12th St., SW - Room 8B115
Washington, DC 20554

Robert Pepper
Federal Communications Commission
445 12th St., SW - Room 7C-347
Washington, DC 20554

Amy Nathan
Federal Communications Commission
445 12th St., SW - Room 7C-347
Washington, DC 20554

Jonathan Levy
Federal Communications Commission
445 12th St., SW - Room 7C-362
Washington, DC 20554

Deborah Lathen
Federal Communications Commission
445 12th St., SW - Room 7C-754
Washington, DC 20554

Brian Adkins
Director of Government Relations
Information Technology Industry Council
1250 Eye Street, NW, Suite 200
Washington, DC 20005

David H. Arland
Director, Government and Public
Relations, Americas
Thomson Consumer Electronics, Inc.
P.O. 1976, INH-430
Indianapolis, IN 46206-1976

Lawrence R. Sidman
Michael M. Pratt
Verner, Liipfert, Bernhard, McPherson
& Hand, Chartered
901 - 15th St., NW, Suite 700
Washington, DC 20005

Thomas B. Patton
Vice President, Government Relations
Philips Electronics North America Corp.
1300 Eye Street, NW, Suite 1070E
Washington, DC 20005

Bob Quicksilver
Maureen O'Connell
News Corporation
444 North Capitol Street, NW, Suite 740
Washington, DC 20001

Bruce D. Sokler
Christopher J. Harvie
Fernando R. Laguarda
Susan E. McDonald
Mintz, Levin, Cohn, Ferris, Glovsky
& Popeo, P.C.
701 Pennsylvania Ave., NW
Washington, DC 20004

Aaron I. Fleishman
Arthur H. Harding
Craig A. Gilley
Lisa Chandler Cordell
Fleischman and Walsh, L.L.P.
1400 - 16th Street, NW, Suite 600
Washington, DC 20036

David A. Nall
Benigno E. Bartolome
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Ave., NW
P.O. Box 407
Washington, DC 20044

Michael Petricone
Gary S. Klein
Ralph Justus
CEA
2500 Wilson Boulevard
Arlington, VA 22201

Gary Shapiro
President & CEO
Consumer Electronics Association
2500 Wilson Boulevard
Arlington, VA 22201

Preston R. Padden
Government Relations
The Walt Disney Company
1150 17th St., NW, Suite 400
Washington, DC 20036

Christine G. Crafton
Broadband Regulatory Policy
Motorola, Inc.
1350 I Street, NW, Suite 400
Washington, DC 20005-3305

Dwight Sakuma
Motorola BCS
101 Tournament Dr.
Horsham, PA 10944

Willkie Farr & Gallagher
Three Lafayeete Centre
1155 21st St., NW, Suite 600
Washington, DC 20036-3384

Larry S. Goldberg, Director
Gerry Field
Media Access Group
WGBH Educational Foundation
125 Western Avenue
Boston, MA 02134

Michael Smannsky
Metro-Goldwyn-Mayer Studies, Inc
2500 Broadway Street
Santa Monica, CA 90404-3061

Thomas J. Ostertag
Office of the Commissioner of Baseball
245 Park Avenue
New York, NY 10167

Ritchie Thomas
Judith Jurin Semo
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Ave., NW
Washington, DC 20004

William Check
Andy Scott
Daniel L. Brenner
Neal Goldberg
Loretta P. Polk
National Cable Television Assn.
1724 Massachusetts Ave., NW
Washington, DC 20036

David K. Moskowitz
EchoStar Communications Corporation
5701 South Santa Fe
Littleton, CO 80120

Chris Haskell
ATI Technologies, Inc.
75 Tiverton Court
Unionville, Ontario
Canada L3R 9S3

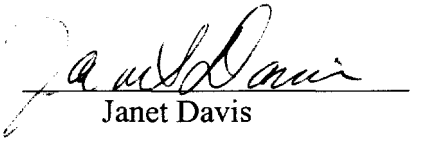
Robert Alan Garrett
Gary R. Greensein
Arnold & Porter
555 Twelfth Street, NW
Washington, DC 20004-1206

Philip R. Hochberg
Verner, Liipfert, Bernard, McPherson
& Hand
901 15th St. NW
Washington, DC 20005

Brian Adkins
Information Technology Industry Council
1250 Eye Street, NW, Suite 200
Washington, DC 20005

Anne Lucey
Viacom
1501 M Street, Nw, Suite 1100
Washington, DC 20005

Philip L. Malet
Pantelis Michalopoulos
Colleen Sechrest
Steptoe & Johnson, LLP
1330 Connecticut Ave., Nw
Washington, DC 20036



Janet Davis